



# DECISION

*Fair Work Act 2009*

s.394 - Application for unfair dismissal remedy

**Shane Stephens**

v

**Citic Pacific Mining Management Pty Ltd**

(U2025/14311)

DEPUTY PRESIDENT EASTON

SYDNEY, 18 FEBRUARY 2026

*Application for relief from unfair dismissal – late discontinuance – costs.*

[1] On 1 September 2025 Mr Shane Stephens made an unfair dismissal application to the Fair Work Commission under s.394 of the *Fair Work Act 2009* (Cth), alleging that he had been unfairly dismissed from his employment with Citic Pacific Mining Management Pty Ltd. In his application Mr Stephens sought reinstatement to his former position.

[2] On 16 January 2026 Mr Stephens discontinued his claim - less than one hour before the scheduled hearing. Citic Pacific sought an order for costs.

## Background

[3] On 21 November 2025 I made Directions to prepare the matter for hearing. In December Mr Stephens was granted an extension to file his evidence late. As a result, the timetable was quite condensed in the period shortly before the hearing date.

[4] Mr Stephens' unfair dismissal claim was not strong. Mr Stephens was a FIFO worker and failed a random drug test at the start of a swing. On the morning in question Mr Stephens gave two urine samples because the first sample was outside of the acceptable temperature range. One Emergency Services Worker who was present at the testing said that the first sample was "fridge cold", said it was outside the acceptable temperature range of 33 to 38 degrees Celsius and therefore did not register a result, and noted that "the body is kept stable between approximately 36.5 to 37.5 degrees Celsius. All fluids that come out of the human body, as a result, will be within that range. It is impossible for a fluid to come out of the body outside of that range without the individual being severely sick or dead." The first sample was analysed in a laboratory and contained no urea or uric acid. The report from the testing laboratory said, "This specimen has failed urine integrity checks and is inconsistent with normal human urine."

[5] The second sample taken on the same morning tested positive for THC. Mr Stephens was dismissed for failing a drug test and for tampering with the first sample. Mr Stephens claimed that the dismissal was unfair because of concerns about the chain of custody of the two samples and because of procedural fairness concerns.

[6] It was reasonably clear from the outset that Citic Pacific had a valid reason to dismiss Mr Stephens. Mr Stephens' case relied on some claimed technicalities in the process undertaken by Citic Pacific in the course of his dismissal. The evidence filed by Citic Pacific was comprehensive and, in my view, properly overcame the technicalities raised by Mr Stephens.

[7] Because of the altered and compressed timetable, Citic Pacific's evidence was due only four days before the hearing, and Mr Stephens' reply evidence was due two days before the hearing.

[8] Mr Stephens appeared to go to ground after filing his first round of evidence. He did not respond to emails from the Commission, nor inquiries from Citic Pacific's representative.

[9] Citic Pacific filed witness statements by four employees and then tried to ascertain from Mr Stephens how many witnesses were required for cross-examination in the days before the scheduled hearing.

[10] Mr Stephens did file evidence and submissions in reply, but not until 2:00am on the day after it was due.

[11] On the evening before the hearing, at the very last minute, Mr Stephens responded to emails and indicated that all four witnesses were required for cross-examination.

[12] Mr Stephens discontinued his application by email approximately 37 minutes before the scheduled hearing time.

[13] Mr Stephens said he decided on the morning of the hearing that he would discontinue his application because he was overwhelmed and did not feel properly prepared for the hearing.

[14] Mr Stephens said that on the day before the hearing he was "100% intending" to attend.

[15] Citic Pacific made an application for costs under s.400A of the *Fair Work Act 2009* (Cth) (**FW Act**). The Commission and Citic Pacific had deployed considerable resources to prepare for the hearing. I therefore expedited Citic Pacific's costs application and heard it on the same day as the scheduled merits hearing so that the time allocated for the hearing was not completely wasted.

### **Costs Orders in Unfair Dismissal claims**

[16] The relevant provisions of the FW Act are sections 400A and 611.

#### **"400A Costs orders against parties**

The FWC may make an order for costs against a party to a matter arising under this Part (the first party) for costs incurred by the other party to the matter if the FWC is satisfied that the first party caused those costs to be incurred because of an unreasonable act or omission of the first party in connection with the conduct or continuation of the matter.

The FWC may make an order under subsection (1) only if the other party to the matter has applied for it in accordance with section 402.

This section does not limit the FWC’s power to order costs under section 611.”

[17] The following general principles are well established:

- a) in the ordinary course of litigation costs follow the event. The purpose of a costs order is not to punish the unsuccessful party but to compensate the successful party against the expense to which he or she has been put by reason of the legal proceedings (*Latoudis v Casey* [1990] HCA 59 at [13], (1990) 170 CLR 534 at 543);
- b) the purpose or policy of the cost provisions in the FW Act are to free parties from the risk of having to pay their opponents’ costs in matters arising under the Act, while at the same time protecting parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause (*Australian Workers Union v Leighton Contractors Pty Ltd (No 2)* [2013] FCAFC 23 at [7], (2013) 232 FCR 428;
- c) to the extent that the cost provisions of the FW Act provide a protection against costs orders, that protection can be lost by certain conduct (per *Kangan Batman Institute of Technology and Further Education v AIRC* [2006] FCAFC 199 at [60], (2006) 160 IR 405 at 419);
- d) the costs provisions provide a deterrent against unreasonable conduct during proceedings, discourage frivolous and speculative claims and assist in the efficient resolution of claims by encouraging all parties to approach proceedings in a reasonable manner (*Explanatory Memorandum to the Fair Work Amendment Bill 2012*, p 7); and
- e) there is a need to scrutinise the manner in which proceedings under the FW Act are conducted to ensure that costs are not unreasonably incurred and that the public interest in the orderly and cost-effective administration of justice is not too readily placed to one side (see *Tomvald v Toll Transport Pty Ltd* [2017] FCA 1208 at [315]).

[18] Section 400A is concerned with unreasonable acts or omissions in the conduct or continuation of a matter already instituted, as opposed to the reasonableness of commencing a matter in the first place (per *Gugiatti v SolarisCare Foundation Ltd* [\[2016\] FWCFCB 2478](#) at [61]):

- a) there are two pre-conditions for the making of a costs order: (1) that a party engaged in an unreasonable act or omission in relation to the conduct or continuation of a matter, and (2) that the act or omission caused the other party to the matter to incur costs;

- b) whether an act is “unreasonable” is informed by its context and requires an evaluative assessment of all the circumstances;
- c) the continuation of a matter might be an unreasonable act if, on the facts apparent to the party at the relevant time, there was no substantial prospect of success (*Roy Morgan Research v Baker* [\[2014\] FWCFCB 1175](#) at [24]-[31]);
- d) a failure to inform another party of an inability to attend proceedings would be, if intentional, unreasonable and, even if accidental, an unreasonable omission (*Goffet v Recruitment National Pty Ltd* [\[2009\] AIRCFB 626](#) at [35], (2009) 187 IR 262 at 270); and
- e) a failure to advise the other party of the first party’s intentions, such as the intention to maintain a jurisdictional objection, could be unreasonable conduct if found to be deliberate or reckless (*Goffet v Recruitment National Pty Ltd* [\[2009\] AIRCFB 626](#) at [47], (2009) 187 IR 262 at 273).

[19] Even when a condition under s.400A is satisfied, the power to award costs is discretionary.

### **Citic Pacific’s Costs Application**

[20] Citic Pacific claimed that it incurred costs because of the unreasonable acts and omissions of Mr Stephens in his conduct and continuation of the matter by:

- a) not responding at all or in a timely manner to correspondence from Citic Pacific;
- b) not responding in a timely manner to correspondence from the Commission;
- c) requesting cross-examination of all four witnesses shortly before discontinuing the matter;
- d) seeking an adjournment the day before the hearing instead of discontinuing the matter at an earlier time; and
- e) then discontinuing his claim 37 minutes prior to the hearing commencing.

[21] Citic Pacific sought an order that Mr Stephens bear Citic Pacific’s costs incurred due to Mr Stephens’ unreasonable acts, in particular:

- a) preparing four witnesses for hearing (in circumstances where it was unclear whether Mr Stephens intended to cross-examine them until 3.45 pm the day before the scheduled hearing);
- b) preparing to cross examine Mr Stephens, in circumstances where it appeared the outcome of the matter would turn significantly upon that cross examination given Mr Stephens continued to deny the alleged misconduct;
- c) preparation of a digital court book for the hearing; and
- d) preparation for delivery of oral submissions at the hearing, including a response to Mr Stephens’ reply submissions.

### **Consideration**

[22] Citic Pacific's frustration and annoyance with the late discontinuance is entirely understandable.

[23] Citic Pacific submitted that the late discontinuance was an indication of Mr Stephens' intention over previous days to inconvenience Citic Pacific and cause Citic Pacific to incur the costs of preparing for a case that Mr Stephens had no intention to run.

[24] Obviously Citic Pacific can only speculate about Mr Stephens' intentions, as can I. However, Mr Stephens took steps to prepare his case in the final days before the hearing, although not quickly and diligently, which is at odds with Citic Pacific's submission.

[25] If Mr Stephens had filed no materials in reply, or filed only flotsam and jetsam, then it could be more readily accepted that Mr Stephens was acting unreasonably with the objective of causing Citic Pacific to incur costs.

[26] However, I accept that the reply material filed at 2:00am must have taken considerable thought, effort and time to complete. It is not open to find that Mr Stephens had no intention to run his case as late as 2:00am on the day before the scheduled hearing.

[27] Quite properly, Citic Pacific confined its application to costs incurred directly because of Mr Stephens' unreasonable conduct. Citic Pacific was not required to quantify these costs because the costs application was dealt with expeditiously on the day of the hearing.

[28] The conduct said to be unreasonable (see [21] above) can be considered in two categories: (1) conduct associated with the preparation for hearing and (2) the decision not to discontinue the application earlier / the decision to discontinue the application so late in the process.

[29] Mr Stephens' failure to respond to queries and his tardiness in filing his materials was unreasonable but I am not satisfied that these actions, without more, caused Citic Pacific to incur costs unnecessarily. If the merits hearing had started and Citic Pacific's witnesses had been cross-examined by Mr Stephens, then none of the costs of arranging witness attendance and so on would have been incurred unnecessarily. There would have been a relatively small additional cost incurred by Citic Pacific in chasing Mr Stephens for responses.

[30] When viewed in hindsight, knowing that Mr Stephens discontinued his application just before the hearing, Mr Stephens' unresponsiveness and tardiness could be seen to have caused Citic Pacific to incur costs unreasonably - but only if I was to accept that Mr Stephens had already decided that he was going to discontinue his application.

[31] As indicated above, I do not think such a finding can be made in light of the materials Mr Stephens filed the day before the hearing.

[32] Mr Stephens' decision to discontinue his application so close to the commencement of the hearing was also unreasonable conduct. The hearing was scheduled to commence at 9:00am and Mr Stephens discontinued his application at 8:23am. In the circumstances, I must assume that Mr Stephens only decided to discontinue his application that morning.

[33] Once again I am not satisfied that this unreasonable conduct caused Citic Pacific to incur costs. Citic Pacific did not incur costs thrown away for the day, such as counsel fees. Save for attending a hearing regarding Citic Pacific's costs application, Citic Pacific's legal representatives were no longer required to attend the Commission after Mr Stephens discontinued.

[34] It would be contrary to the legislative scheme for an applicant to have to run their case in order to avoid a costs application.

### **Conclusion**

[35] Mr Stephens' application was weak from the outset. The purpose or policy of the cost provisions in the FW Act are to free parties from the risk of having to pay their opponents' costs in matters arising under the Act, while at the same time protecting parties who are forced to defend proceedings that have been instituted vexatiously or without reasonable cause. Citic Pacific did not allege that the proceedings were instituted vexatiously or without reasonable cause.

[36] To the extent that the cost provisions of the FW Act provide a protection against costs orders, that protection can be lost by certain conduct, including an unreasonable act or omission in relation to the conduct or continuation of an unfair dismissal claim that causes the other party to incur costs (per s.400A). Citic Pacific incurred costs properly defending Mr Stephens' claim. Mr Stephens' tardiness and late discontinuance were unreasonable, but I am not satisfied that that unreasonable conduct caused Citic Pacific to incur costs that they would not otherwise have incurred.

[37] Mr Stephens' application has concluded by way of Mr Stephens' discontinuance. Citic Pacific's costs application is dismissed.



DEPUTY PRESIDENT

*Appearances:*

*Mr Stephens* acting for himself.

*Ms R Dawson* of HSF Kramer for the Respondent/Costs-Applicant

*Hearing details:*

2026.

Sydney (By Video)

January 16.

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